No. 82-492

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HERMAN SOLEM, WARDEN,
SOUTH DAKOTA STATE PENITENTIARY,
Petitioner,

v.

JERRY BUCKLEY HELM,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a sentence of life imprisonment without parole for a non-violent, alcoholic habitual offender's seventh felony constitutes cruel and unusual punishment under the Eight and Fourteenth Amendments to the United States Constitution?

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HERMAN SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY,

Petitioner,

v.

JERRY BUCKLEY HELM,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

The background proceedings, as stated in the Eighth Circuit panel opinion, are as follows:

Helm entered a guilty plea to a felony charge of uttering a "no account" check for $100. Against the advice of counsel, Helm also admitted to six prior felony convictions[1] and, as a result, was sentenced as an habitual offender.[2]

The record indicates that Helm, age thirty-six at the time of his conviction, is an alcoholic and has spent much of the last fifteen years in the South Dakota State Penitentiary. State v. Helm, 287 N.W.2d 497, 499 (S.D. 1980). Alcohol contributed to Helm's actions leading to this

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[1] The six prior felonies included three convictions for third degree burglary, and one conviction each for a third offense for driving while intoxicated, grand larceny, and obtaining money under false pretenses. Helm v. Solem, No. 82-1039, Appendix to Petition for Certiorari, A-1, A-2 n.1 (8th Cir. 1982); State v. Helm, 287 N.W.2d 497, 501 (S.D. 1980).

[2] South Dakota's habitual offender statute reads:

> Three or more prior felony convictions--Sentencing as for Class 1 felony. When a defendant has been convicted of at least three prior convictions in addition to the principle felony, the sentence for the principal felony shall be enchanced to the sentence for a Class 1 felony. [S.D. Codified Laws Ann. §22-7-8 (1979)] (quoted in Brief for Petitioner at 4).

conviction and each of his prior convictions. In describing the facts prior to his guilty plea to the bad check charge, Helm stated:

"I was working in Sioux Falls, and got my check that day, was drinking and I ended up here in Rapid City with more money than I had when I started. I knew I'd done something I didn't know exactly what. If I would have known this, I would have picked the check up. I was drinking and didn't remember, stopped several places." [State v. Helm, supra, 287 N.W.2d at 501]

Following entry of his guilty plea, Helm waived his right to a pre-sentence investigation and requested immediate sentencing. The State trial judge acceded to his request and made the following statement in pronouncing Helm's life sentence from the bench:

"Well, I guess most anybody looking at this record would have to acknowledge you have a serious problem, if you've been drinking all this time and your prior imprisonments have not had any effect on your drinking problem, so far as motivating you for change. If you get out in the near future, you're going to be committing further crimes, so I can't see any purpose in my extending any leniency to you at all here and I intend to give you a life sentence.

It will be up to you and the parole board to work out when you finally get out, but I think you certainly earned this sentence and certainly proven that you're an habitual criminal and the record would indicate that you're beyond rehabilitation and that the only prudent thing to do is to lock you up for the rest of your natural life, so you won't have further victims of your crimes, just be coming back before courts. You'll have plenty of time to think this one over." [State v. Helm, supra, 287 N.W.2d at 500.]

The statute in effect at the time of Helm's sentencing provided that "[a] person sentenced to life imprisonment is not eligible for parole by the board of pardons and paroles." S.D. Codified Laws Ann. §24-15-4 (1979). Thus, by imposing a life sentence, the sentencing judge committed Helm to the state penitentiary for the remainder of his natural life, baring a pardon or commutation of his sentence.

Helm appealed from his sentence, contending that the imposition of a sentence of life imprisonment without parole denied him due process and constituted cruel and unusual punishment. The Supreme Court of South Dakota, with two justices dissenting, affirmed the

> judgment of the trial court. State v. Helm, supra.
>
> Helm then petitioned for a writ of habeas corpus in federal district court alleging that his sentence constituted cruel and unusual punishment, and that the sentencing procedure violated his right to due process because the judge imposed the maximum sentence allowed by law without a pre-sentence investigation. The State filed an answer to Helm's petition, and the district court denied the petition without a hearing. In a memorandum opinion, the district court determined that Helm had effectively waived any right to a presentence investigation, and that Rummel v. Estelle, 445 U.S. 263 (1980), disposed of Helm's claim that the sentence imposed constituted cruel and unusual punishment. Helm filed this appeal.

Helm v. Solem, No. 82-1039, Appendix to Petition for Certiorari [hereinafter "App. to Pet."], A-1, A-2 to A-7 (8th Cir., Aug. 4, 1982).

The Eighth Circuit panel reversed and remanded Helm's sentence "with directions to issue the writ if, within sixty (60) days following the issuance of our mandate, the State has not resentenced Helm." Helm v.

Solem, supra at App. to Pet., A-21.

The State then petitioned this Court for a writ of Certiorari.

SUMMARY OF ARGUMENT

A. The Constitutional Prohibition Against Cruel and Unusual Punishment Requires that Sentence of Life Imprisonment without Parole Bear Some Relationship to the Severity of the Underlying Crime.

Petitioner argues that the proportionality analysis applied by this Court to the sentence of death in Coker v. Georgia, 433 U.S. 584 (1977) is inapplicable to this case, since the sentence involved in this case is life imprisonment, not death. Petitioner cites Rummel v. Estelle, 445 U.S. 263 (1980), as authority for this argument.

The sentence involved in Rummel was life with parole. This Court refused to apply the Coker proportionality analysis to Rummel's sentence because it differed in kind from a sentence of death. A sentence of life imprisonment without parole, however,

does not differ so clearly from a death sentence since both punishments are irrevocable and completely reject rehabilitation of the convict. Therefore, just as the death penalty, a life sentence without parole differs in kind from other sentences of imprisonment. The Eighth Amendment to the United States Constitution, therefore, requires that a sentence of life without parole bear some relationship to the severity of the underlying offense.

B. The Sentence in this Case Is Excessive.

This Court in Coker v. Georgia, 433 U.S. 584 (1977), indicated that a punishment is unconstitutionally excessive if it "(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain or suffering; or (2) is grossly out of proportion to the severity of the crime." Id. at 592.

1. Disproportionality

The three objective factors (nature of the offense, punishment for the offense in other jurisdictions, and punishment for other offenses in the same jurisdiction) employed by this Court in analyzing the proportionality of an offense to the sentence imposed, all demonstrate Helm's sentence in this case is out of proportion to his offense.

a. Nature of the Offenses.

All of Helm's prior felony convictions were non-violent. All of the prior felony convictions were a product of Helm's alcoholism. The final felony which triggered Helm's sentence was also a product of his alcoholism and was not a very culpable offense.

b. Punishment for the Same Offense in Other Jurisdictions.

The Eighth Circuit in this case, after reviewing the habitual offender laws of all

the other states, discovered Nevada was the only jurisdiction outside of South Dakota where Helm could have received a sentence of life without parole for the offenses he was convicted of.

c. Punishment for Other Offenses in South Dakota.

In South Dakota only a person convicted of murder, first degree manslaughter, rape, first degree arson or kidnapping could receive a sentence as severe as that of Helm. A person convicted of first degree rape or robbery could not be sentenced as severely as Helm.

2. No Measurable Contribution to Acceptable Penal Goals.

Helm's sentence in this case serves none of the recognized legitimate goals of punishment.

A sentence short of permanent incarceration is sufficient to deter a non-violent offender such as Helm from further violations of the law.

Second, isolation of a repeat offender is an acceptable objective only to the degree that the offender endangers public safety or welfare. Helm does not present such a threat to public safety or welfare that his permanent incarceration is appropriate.

Third, retribution is a legitimate penal objective only when the punishment fits the crime.

Finally, Helm's sentence rejects his rehabilitation completely. A sentence which sought some rehabilitation of Helm through treatment of his alcoholism could as effectively satisfy society's interest in preventing future violations of the law as the life sentence without parole actually imposed.

ARGUMENTS

LIFE IMPRISONMENT WITHOUT PAROLE IS SO DISPROPORTIONATE TO THE UNDERLYING OFFENSES FOR WHICH HELM WAS CONVICTED THAT IT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

A. Because a Life Sentence Without Parole Differs in Kind from Other Sentences of Imprisonment, the Constitutional Prohibition against Cruel and Unusual Punishment Requires that It Bear Some Relationship to the Severity of the Underlying Crime.

Petitioner argues that the proportionality test expressed by this Court in Coker v. Georgia, 433 U.S. 584 (1977) is inapplicable to Helm's sentence. Brief for Petitioner [hereinafter "Brief for Pet."] at 18. Petitioner relies on the recent decision of this Court in Rummel v. Estelle, supra. Brief for Pet. at 10 to 18.

The Eighth Circuit was correct in regarding Rummel v. Estelle as not controlling in this case. Because a sentence of life imprisonment without parole differs in kind from other sentences of imprisonment, including life imprisonment with parole, the Eighth Amendment to the United State Constitution requires that it bear some relationship to the severity of the

underlying crime.

1. Because a Sentence of Life without Parole Cannot Be as Clearly Distinguished from the Death Penalty as Was the Sentence of Life with Parole in Rummel, Rummel Does not Control in this Case.

In Rummel v. Estelle, supra, this Court held a life sentence under Texas recidivist law for conviction of three property related felonies did not constitute cruel and unusual punishment under the Eighth Amendment. In disposing of Rummel's argument that the Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime, this Court acknowledged in Rummel that that proposition had been previously expressed by the Court, most frequently in death penalty cases. Rummel, 445 U.S. at 271 (Rehnquist, Burger, White, and Blackmun, J J., plurality opinion). However, the proportionality principle as

applied in death penalty cases was of limited applicability to the sentence before the Court in Rummel since the sentence of death differs in kind from a sentence of imprisonment. Rummel, 445 U.S. at 272. Consequently, a plurality of this Court refused to apply a proportionality analysis to Rummel's sentence, although the Court did admit that a proportionality principle would come into play in an imprisonment sentence in extreme cases. Rummel, 445 U.S. at 274 n.11 (Rehnquist, Burger, White and Blackmun, JJ., plurality opinion).

Like the en banc Fifth Circuit Court of Appeals,[3] this Court attached importance to the fact that Rummel, although sentenced to life imprisonment, would be eligible for parole in as little as 12 years:

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[3] See Rummel v. Estelle, 587 F.2d 651 (5th Cir. 1978).

> ...Texas, we are told, has a relatively liberal policy of granting "good time" credits to its prisoners, a policy that historically has allowed a prisoner serving a life sentence to become eligible for parole in as little as 12 years. See Brief for Respondent 16-17. We agree with Rummel that his inability to enforce any "right" to parole precludes us from treating his life sentence as if it were equivalent to a sentence of 12 years. Nevertheless, because parole is "an established variation on imprisonment of convicted criminals" Morrissey v. Brewer, 408 U.S. 471, 477, (1972), a proper assessment of Texas' treatment of Rummel could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life. If nothing else, the possibility of parole, however slim, serves to distinguish Rummel from a person sentenced under a recidivist statute like Mississippi's, which provides for a sentence of life without parole upon conviction of three felonies including at least one violent felony. See Miss. Code Ann. §99-19-83 (Supp. 1979).

Rummel, 445 U.S. at 280-81 (Rehnquist, Burger, White and Blackmun, J J., plurality opinion).

The two factors which this Court employed in not applying the proportionality analysis to Rummel's sentence, i.e. the unique nature of the death penalty and Rummel's eligibility for parole, are not present in the sentence involved in this case. For Helm, although sentenced to the same penalty of life imprisonment as Rummel, is never eligible under South Dakota law for parole. His sentence of life imprisonment means he will remain imprisoned for the rest of his life. Consequently, Mr. Helm's sentence in this case is not so distinguishable from a sentence of death as to render inapplicable the proportionality principle applied by this Court in death penalty cases.

In Rummel, this Court in pointing out the vast difference between Rummel's sentence and a death sentence, quoted

Justice Stewart in Furman v. Georgia:

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity. Furman, 408 U.S. 238, 306 (1972).

Rummel, 445 U.S. at 472 (Rehnquist, Burger, White and Blackmun, JJ., plurality opinion); see also Woodsond v. North Carolina, 428 U.S. 280, 304 (1976). Helm's sentence in this case though, unlike Rummel's, approaches the irrevocability of a death sentence since his imprisonment for life cannot even be revoked by the possibility of parole. Also, Mr. Helm's sentence in this case rejects his rehabilitation completely. It is not, therefore, unique from the death penalty in this rejection of the basic purpose of criminal justice.

Consequently, as pointed out by the Eighth Circuit in this case, the life sentence without parole of Helm differs in kind from the life sentence with parole of Rummel.[4]

> A life sentence without parole differs qualitatively from a sentence for a term of years or a life sentence with the prospect of parole. As with the death penalty, the state totally rejects rehabilitation as a basic goal of our criminal justice system by imposing a life sentence without parole.[5]

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[4] Petitioner also argues that this Court's per curiam decision in Hutto v. Davis, __U.S.___, 30 Cr. L. 4159 (1982), controls this case. Pet. Brief at 13. However, as pointed out by the Eighth Circuit in its opinion in this case (App. to Pet., A-12), Hutto v. Davis is inapposite to this case since Davis did not receive a sentence of life imprisonment but consecutive sentences for a definite term of years; morever, Davis' sentence carried the prospect of parole.

[5] The Eighth Circuit also recognized that a life sentence without parole also differs qualitatively from the death penalty. Therefore, in imposing such a sentence the procedures need not correspond exactly to those for imposing the death penalty. Helm v. Solem, App. to Pet., A-14 n.7. See also Terrebonne v. Blackburn, 646 F.2d 997, 1008 (5th Cir. 1981) (Frank Johnson, Jr., J., dissenting).

Helm v. Solem, App. to Pet., A-13 to A-14.

2. Rummel's Eligibility for Parole Cannot Be Equated with the Possibility of Commutation in this Case.

Petitioner argues that Helm's sentence is not constitutionally distinguishable from Rummel's by equating eligibility for parole with a "right of commutation." Brief for Pet. at 21.

First of all, Helm has no "right of commutation." This Court, in deciding against a Connecticut prisoner's claim to the right of written notice of the reason for denial of his application for commutation of his sentence, defined the prisoner's interest in commutation as "simply a unilateral hope," not a right. Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 465 (1981). Helm's "unilateral hope" for executive clemency is no more, and is entitled to no more weight in assessing the severity of his sentence,

than the hope for clemency of a prisoner sentenced to death.

In contrast, this Court in Morrissey v. Brewer, 408 U.S. 471, 477 (1972), stated:

> During the past 60 years, the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system. Note, Parole Revocation in the Federal System, 56 Geo. L.J. 705 (1968). Rather than being an ad hoc exercise of clemency, parole is an established variation on imprisonment of convicted criminals.[6]

In Wolff v. McDonnell, 418 U.S. 539 (1974), this Court held the interests of Nebraska prisoners in earlier parole eligibility was a right protected by due process requiring minimum procedural

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[6] The statistics cited by Justice Marshall in his dissenting opinion in Greenholtz v. Nebraska Penal Inmates, 442. U.S. 1, 30-31 (1979), attest to the integral part release on parole has in our penological system.

protections in disciplinary actions to revoke good time credits.

It is not true, as Petitioner asserts (Brief for Pet. at 21), that the Eighth Circuit in its decision in this case ignored the statistics showing the number of prisoners in South Dakota serving life sentences whose application for commutation of their sentence was granted or denied by the Govenor. In fact, the Eighth Circuit in Britton v. Rogers, 631 F.2d 572, 578 (8th Cir. 1980), cert. denied, 451 U.S. 939 (1981), noting that the Governor of Arkansas had commuted 30 life sentences to terms of years between 1974 and 1979, denied habeas corpus relief to an Arkansas prisoner who claimed his life sentence without parole was cruel and unusual punishment. In this case at oral argument, the Eighth Circuit panel requested the State of South Dakota to provide the Court

with statistical evidence concerning the results of commutation requests from prisoners serving life sentences in the South Dakota penitentiary. Brief for Pet. at 7. These statistics show that not a single life sentence has been commuted in South Dakota since 1975, although requests from 25 prisoners, including Helm, were denied during the same period. Joint Appendix [hereinafter "J.A."], 23 to 29. On such a record, the Eighth Circuit could simply not equate the possibility of commutation with eligibility for parole in Rummel. Helm v. Solem, App. to Pet., A-13 n.5.

3. Because a Life Sentence without Parole Differs Qualitatively from Other Sentences of Imprisonment, the Sentence Must Be Proportional to the Offense.

Because a life sentence without parole differs qualitatively from a sentence for a term of years or a life sentence with

prospects of parole, this Court's reasons for not applying a proportionality analysis to Rummel's sentence are not pertinent to the sentence in this case.

This Court has before applied the Eighth Amendment to invalidate an exceedingly long prison term. In Weems v. United States, 217 U.S. 349 (1910), the sentence involved was 12 years at cadena temporal, i.e. hard labor with chains, plus lifetime restrictions for falsifying a public record. Although the Weems Court based its decision that the sentence was unconstitutional in part on the inherent cruelty of the punishment, it also relied on the separate grounds that the Eighth Amendment prohibits excessively cruel punishment as well as inherently cruel forms of punishment and that the length of punishment must be proportioned to the

offense.[7] Although the Court has not held a sentence unconstitutionally disproportionate in length since Weems,[8] recent decisions appear to endorse the continuing validity of the Weems proportionality

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[7] Gregg v. Georgia, 428 U.S. 153, 171-72 (1976) (Stewart, Powell and Stevens, JJ., plurality opinion); see Weems, 217 U.S. at 367-68, 371-73, 377; accord, Hutto v. Finney, 437 U.S. 678, 685 (1978); Furman v. Georgia, 408 U.S. 238, 325 (1972) (Marshall, J., concurring); compare Weems, 217 U.S. at 411 (dissenting opinion) (characterizing the majority as holding that "because of the mere term of imprisonment...[the sentence can be reviewed for an abuse of legislative discretion]"); see also Ingraham v. Wright, 430 U.S. 651, 667 (1977).

[8] In Badders v. United States, 240 U.S. 391, 394 (1916), this Court stated there was simply "no grounds for declaring the punishment unconstitutional." But Badders involved a sentence of 5 years for commission of 7 crimes, hardly comparable to a life sentence without parole. See Rummel, 445 U.S. at 290 n.7 (Powell, Brennan, Marshall and Stevens, JJ., dissenting). Morever, Badders, which does not mention Weems, is not even a disproportionality case; the convicted defendant's only Eighth Amendment objection challenged the mail fraud statutes making the deposit of each letter a separate offense. See 240 U.S. at 393.

principle as a restriction on excessively long sentences.[9]

In Rummel, this Court did not apply the proportionality principle espoused in Weems and in Coker v. Georgia, 433 U.S. 584 (1977), because the punishments in those two cases were clearly distinguishable from traditional forms of imprisonment, while the prison sentence of Rummel was not; consequently, this Court refrained from applying a proportionality analysis to Rummel's sentence because to do so would involve a more extensive intrusion

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[9] Jeffries and Stephans, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 Yale L.J. 1325, 1378 & n.164 (1979) (citing cases); see, e.g., Coker v. Georgia, 433 U.S. 584, 592 (White, Stewart, Blackmun and Stevens, JJ., plurality opinion), quoted approvingly in Ingraham v. Wright, 430 U.S. 651, 691 n.9 (1977) (White, Brennan, Marshall and Stevens, JJ, dissenting); Furman v. Georgia, 408 U.S. 238, 272 n.14 (1972) (Brennan, J., concurring); id. at 457 (Powell, Burger, Blackmun and Rehnquist, JJ., dissenting); Enmund v. Florida, __U.S.___, 73 L.Ed2d 1140, 1146 (1982); See also Bordenkircher v. Hayes, 434 U.S. 357, 370-71 (1978) (Powell, J., dissenting).

than was required in Weems and Coker into "...the basic line drawing process that is pre-eminently the province of the legislature when it makes an act criminal." Rummel, 445 U.S. at 275 (Rehnquist, Burger, White and Blackmun, JJ., plurality opinion).

However, a sentence of life imprisonment without parole, such as involved in this case, differs qualitatively from other sentences of imprisonment. See pp. 12-17 infra. A "bright line" between life without parole and "...various other permutations and commutations of punishment short of that...sanction" (Rummel, 445 U.S. at 275) can be drawn in this case just as such a "bright line" could be drawn between other forms of punishment and the punishments involved in Weems and in Coker. Consequently, the fear of more extensive intrusion

into the legislative prerogative, which compelled a plurality of this Court to hold back from applying a proportionality analysis in Rummel, is not present in this case.

The Eighth Circuit was following the doctrines articulated by this Court in Weems and Coker in holding that the Eighth Amendment required the sentence in this case (life without parole) bear some relationship to the severity of the underlying crime. Far from ignoring the dictates of this Court in Rummel cautioning against intruding on the line drawing process preeminently the province of the legislature, the Eighth Circuit carefully drafted its judgment to preclude South Dakota only from imposing the extraordinarily drastic punishment of life without parole, leaving South Dakota to draw its own lines among usual forms of imprisonment. See J.A., 30.

B. Helm's Sentence Is Unconstitutionally Excessive.

In Coker v. Georgia, 433 U.S. at 592, this Court stated that a punishment is unconstitutionally excessive:

> ...if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering or (2) is grossly out of proportion to the severity of the crime.

The tests are disjunctive: a punishment that fails under either test is invalid. Helm's sentence easily qualifies as excessive under the second test and is excessive under the first test also.

1. A Life Sentence without Parole is Grossly Disproportionate to the Offenses for which Helm was convicted.

In applying the second prong of the Coker test, the prong concerned with the proportion between the punishment and the offense, the Court should be informed by objective factors to the maximum extent

possible to avoid imposing subjective views. Rummel, 445 U.S. at 284 (Rehnquist, Burger, White and Blackmun, JJ., plurality opinion); Id., 445 U.S. at 292 (Powell, Brennan, Marshall and Stevens, JJ., dissenting); Coker, 433 U.S. at 592. Among the objective factors that should be considered according to the dissenting opinion in Rummel are:

> ...(i) the nature of the offense, see Coker v. Georgia, 433 U.S. at 598 (Powell, J., concurring in judgment in part and dissenting in part); (ii) the sentence imposed for commission of the same crime in other jurisdictions, see id, at 593-594; Gregg v. Georgia, 428 U.S. at 179-180; Weems v. United States, supra at 380; cf. Trop v. Dulles, 356 U.S. at 102-103, and (iii) the sentence imposed upon other criminals in the same jurisdiction.

Rummel v. Estelle, 445 U.S. at 295 (Powell, Brennan, Marshall and Stevens,

JJ., dissenting).[10]

a. Examination of Helm's Prior Felony Convictions Indicates that a Life Sentence without Parole is Grossly Disproportionate.

In applying the first objective factor, the nature of the offense, to the sentence imposed upon Helm in this case, it is first of all necessary to recall what Helm's prior convictions were. They consisted in three Third Degree Burglaries, one Obtaining Money Under False Pretenses, one Grand Larceny, and one Third Offense Driving While Intoxicated. Helm v. Solem, App. to Pet.,

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10 See also: Terrebonne v. Blackburn, 646 F.2d 997, 1006 (5th Cir. 1971) (Frank Johnson, Jr., J., dissenting); Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973); State v. Fain, 617 P.2d 720 (Wash. 1980); Wainstreet v. Bordenkircher, 276 S.E.2d 205 (W. Vir. 1981); State v. McDaniel, 612 P.2d 1231 (Kans. 1980); State v. Mullaley, 618 P.2d 586 (Ariz. 1980).

A-2n.1; State v. Helm, 287 N.W.2d 497 (S.D. 1980). None of the prior felonies of Mr. Helm involved injury to the person of another, threat of violence or the use of a weapon. This Court in Rummel suggested making the distinction between non-violent offenses and offenses involving violence inevitably involves identifying subjective distinctions beyond the province of the judiciary. Rummel, 445 U.S. at 275-76. However, as pointed out in the dissenting opinion in Rummel, it is no more difficult for the judiciary to perceive this distinction than the distinction between the gravity of murder and rape, as this Court did in Coker. Rummel, 445 U.S. at 295 n.12 (Powell, Brennan, Marshall and Stevens, JJ., dissenting).

In each of Helm's prior felonies, alcohol was a contributing factor. Helm

v. Solem, App. to Pet., A-19. As pointed out by the Eighth Circuit in this case:

> Although Helm's alcoholism does not excuse his failure to bring his conduct within the social norms prescribed by the criminal law, it is nonetheless a condition amenable to treatment. See Powell v. Texas, 392 U.S. 515, 562 (1968) (Fortas, J., dissenting). To forsake rehabilitation by imposing a life sentence without parole on an individual whose alcoholism has caused him to run afoul of the law, does not accord with "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958).

Helm v. Solem, App. to Pet., A-19.

Of course, sole emphasis should not be placed on the final felony which triggered the sentence of Helm in this case, since the habitual offender statute was designed to enhance the penalty for persons with repeated felony convictions. However, for purposes of proportionality,

the last felony is entitled to more scrutiny than the preceeding felony convictions, "since it provides the ultimate nexus to the sentence." Wainstreet v. Bordenkircher, 276 S.E.2d 205, 212 (W. Vir. 1981).

Helm's principal felony in this case was a $100 no account check offense. In describing the offense to the trial court after his plea of guilty, Helm informed the Judge that he didn't even realize he had done it; he had started drinking and found himself with more money than he had started with; he knew he must have done something, but didn't know exactly what; if he had known about the check, he would have picked it up. Helm v. Solem, App. to Pet., A-3. The offense, then, which triggered Helm's sentence in this case was not a very culpable one; as Justice Henderson

stated in a dissenting opinion in State v. Helm, 287 N.W.2d at 501, Helm's offense "involves one of the most passive felonies a person could commit."

b. In Only One Other Jurisdiction Could Helm Have Received a Sentence as Severe as that Imposed upon Him in South Dakota.

An interjurisdictional comparison of Helm's sentence in this case with the sentence he could have received under the recidivist laws of the other states is considerably less complex and more obvious than the interjurisdictional comparison in Rummel. After an exhausting survey of the recidivist laws of all the states, the Eighth Circuit in this case discovered that Nevada was the only jurisdiction outside of South Dakota where Helm could have been sentenced to life without parole for the offense he was convicted of. Helm v. Solem, App. to Pet., A-16, A-15 to A-17

n. 9 to 11. Consequently, an overwhelming number of state legislatures, in addition to the Congress of the United States (See 18 U.S.C. §3575) have not adopted laws allowing for a sentence so severe as that received by Helm in South Dakota for the offense he committed. These legislative decisions lend credence to the view that Helm's sentence in this case is unconstitutionally disproportionate.[11] Coker v. Georgia, 433 U.S.

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[11] Petitioner seeks to answer the glaring evidence of disproportionality attested to by the interjurisdictional comparison in this case by quoting from Hutto v. Davis; "Absent a constitutionally imposed uniformity; inimical to traditional motions of federalism, some states will always bear the distinction of treating particular offenders more severely than others." Hutto v. Davis, __U.S.__, 30 Cr.L. 4159, n.2 (1982) (quoted in Brief for Pet. at 19). However, the fact that Helm's sentence is more severe than possible in any other state except one is only one of three objective criteria employed to analyze whether his sentence is disproportionate. It is not, by itself, enough to regard the sentence as disproportionate to the offense. "The relevant objective factors should be considered together and, although the weight assigned to each may vary, no single factor will be controlling." Rummel,

at 593-596; Enmund v. Florida, __U.S.__, 73 L.Ed2d 1140, 1146-1149 (1982); Rummel v. Estelle, 445 U.S. at 300 (Powell, Brennan, Marshall and Stevens, JJ., dissenting).

c. South Dakota Punishes No Other Criminal Except One Convicted of Murder, First Degree Manslaughter, Kidnapping or Arson as Harshly as It Punished Helm, and It Punishes More Dangerous Criminals Much Less Severely.

A life sentence in South Dakota can be imposed on any person convicted of a class A or B felony (murder) and upon any person convicted of a class 1 felony (manslaughter in the first degree, kidnapping and arson in the first degree). State v. Helm, 287 N.W.2d at 501. All the other crimes for which a person in

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supra, 445 U.S. at 299 n.19 (Powell, Brennan, Marshall and Stevens, JJ., dissenting).

South Dakota can be sentenced to life imprisonment, therefore, involve either death or the threat of death or violence. Helm, on the other hand, has never in his life committed any offense involving violence or the threat of violence to another. Still, in South Dakota, his sentence is more severe than the sentence imposed for such egregious violations of the rights of others involved in such crimes as first degree rape or first degree robbery. S.D. Codified Laws Ann. §§22-22-1 (1978); 22-30-7 (1976).

Comparison, then, of Helm's sentence with the sentence provided for other criminals in South Dakota also indicates Helm's sentence is not proportionate to his offense.

d. All Three Objective Criteria Indicate Helm's Sentence Is Disproportionate to His Offense.

All three objective criteria indicate, when considered separately, that Helm's sentence is disproportionate to his offense. When all three criteria are considered together, they compell the conclusion that Helm's sentence is grossly disproportionate to his offense.[12]

Justice Henderson, in dissenting from the South Dakota Supreme Court's affirmance of Helm's conviction and sentence, had this to say:

> ...I simply point out that all defendant's offenses were alcohol related and involved money or property. He has been in and out of our State Penitentiary several times. Not withstanding,

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[12] Petitioner points out that the life sentence imposed upon Helm is discretionary, and argues that a discretionary sentence is less harsh than a mandatory one. Brief for Pet. at 22. The discretionary nature of a sentence alone, however, cannot insulate a particular sentence from consitutional attack. The proscription against cruel and unusual punishment applies equally to sentences mandated by legislature and those imposed by Courts. See Furman v. Georgia, 408 U.S. 238, 241 (1972) (Douglas, J.; concurring).

> he has remained an alcoholic and compulsive check writer. Does justice require that after a certain point is reached, we just turn the key--lock the defendant up to languish in prison for a lifetime--and close the final chapter on his life? I cannot agree that justice dictates this result.
>
> The sentence imposed is so excessive that it reaches constitutional dimension. I would reverse and remand the case for the limited purpose of resentencing this defendant proportionate to the offense. Defendant, if he rehabilitates himself, should at least be given an opportunity to obtain parole during his lifetime.

State v. Helm, 287 N.W.2d at 502.

2. The Life Sentence Without Parole Imposed upon Helm Makes a Negligible Contribution to Acceptable Goals of Punishment.

Coker makes clear that a punishment may be excessive if it fails to make a measurable contribution to any legitimate penal goal. Every conceivable legislative

purpose behind Helm's sentence - whether rehabilitation,[13] or isolation; deterrence or retribution[14]- is undermined by Helm's sentence or is served so irrationally by the laws application to him that the objective becomes unacceptable.[15]

a. A Much Shorter Sentence than Life Imprisonment without Parole Is Sufficient to Deter an Offender such as Helm.

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13 Rudolph v. Alabama, 375 U.S. 889 (1963) (Goldberg, Douglas, Brennan, JJ., dissenting from a denial of Certiorari); Spencer v. Texas, 385 U.S. 554 (1967) (Warren, C.J., concurring and dissenting).

14 See Gregg v. Georgia, 428 U.S. 153, 183 (1976): "[t]he death penalty is said to serve two principle social purposes: retribution and deterrence of capital crimes by prospective offenders." quoted in Enmund v. Florida, __U.S.__, L.Ed.2d 1140, 1152 (1982).

15 Cf. Enmund v. Florida, __U.S.__, 73 L.Ed 2d 1140, 1153-54 (1976); see generally Radin, The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishment Clause, 126 U. Pa. L. Rev. 989, 1053, 1055 (1978) (The Coker "measurable contribution" test appears to require that punishment yield some social gain, perhaps even a net gain compared to the harm caused by the pain inflicted on the offender).

Even assuming a potential offender understands the nuances in each State's habitual offender statute,[16] a punishment deters effectively only if it is proportioned to the gravity of the crime. Otherwise, the punishment "is nothing more than the purposeless and needless imposition of pain and suffering" and hence unconstitutional. Enmund, 73 L. Ed.2d at 1152; Coker, 433 U.S. at 592.

When theft and compulsive check writing are punished less severely than armed robbery or rape, and as severely as murder, a criminal has no incentive to commit the less serious offense, and real distinctions between offenses blur.[17]

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16 Considering Helm's statement to the sentencing Judge in this case (see App. to Pet., A-3), it appears very unlikely he contemplated or understood at all the criminal penalties attached when he wrote out the $100 no account check.

17 See: N. H. Const., Bill of Rights §18 (1783), in 1 The Bill of Rights 377 (B. Schwartz, ed. 1971); Wheeler, Towards a Theory of Limited Punishment II:

Fear of the extraordinary severity of a life sentence without parole would induce a previously convicted felon who commits a relatively trivial offense to perpetrate a more serious crime (e.g., inflicting serious injury while resisting arrest) to avoid apprehension out of fear of a sentence of life without parole.[18]

b. Recidivist Laws Isolate only Petty Offenders, Who Remain Incarcerated for a Much Longer Period than Societal Protection Requires.

Isolation of the habitual criminal for societal protection is an acceptable objective only to the extent that the punishment prescribed appears reasonably necessary to

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The Eighth Amendment After Furman v. Georgia, 25 Stan. L. Rev. 62, 75 (1972); Williams, The Courts and Persistent Offenders, 10 Crim. L. Rev. 730, 737-38 (1963).

[18] See Comment, The Eighth Amendment, Beccaria and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine, 24 Buffalo L. Rev. 783, 737-38 (1975).

preserve public safety. Most habitual offender laws, however, are ineffective to society's legitimate concern for protection. Studies consistently reveal that such statutes fail to isolate the true threat to society - the professional, dangerous criminal.[19]

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[19] Grossman, The Treatment of Habitual Criminals in Canada, 9 Crim. L. Q. 95, 101-104 (1966-1967); Klein, Habitual Offender Laws: A Reconsideration, 21 Buffalo L. Rev. 99, 106-08 (1971); Klein, Habitual Offender Legislation and the Bargaining Process, 15 Crim. L. Q. 417, 421, 433-35 (1972-1973); Lynch, Parole and the Habitual Criminal, 13 McGill L.J. 632, 633-34, 638, 644 (1967); Murrah, The Dangerous Offender Under the Model Sentencing Act, 452F.R.D. 161, 165 (1967); Tappan, Book Review, 65 Harv. L. Rev. 1092, 1094 (1952) (reviewing N. Morris, The Habitual Criminal [1951]); Williams, The Courts and Persistent Offenders, 10 Crim. L. Rev. 730, 730-31, 737 (1963); Monograph, The Treatment of the Recidivist in the United States, 23 Can. B. Rev. 638, 663-64 (1945).

Statistics indicate that "most serious offenders never repeat their crimes." S. Rubin, The Law of Criminal Correction, 466 (2d ed. 1973); cf. Lynch, supra, 13 McGill L. J. at 643 (parolees convicted for unpremeditated crimes have the lowest rate of recidivism).

Instead, recidivist laws typically ensnare mostly the petty thief, who may be a nuisance but threatens no one.[20] The result is needless drain on state resources and loss of potentially productive citizens. Even though society has a legitimate interest in removing such misfits from the general population for a time, when the actual sentence greatly exceeds that normally imposed on others with similar convictions who have not been charged as habitual offenders,[21] one can assume that societal protection does not warrant permanent incarceration and that the sentence thus serves no legitimate purpose.

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[20] See authorities cited in note 19, supra.

[21] cf. Rummel, 445 U.S. at 300-301 (Powell, Brennan, Marshall and Stevens, JJ., dissenting).

c. Retribution Is Permissible Only if Punishment Is Proportioned to the Offenses.

This Court recently observed that a defendant's punishment "... must be tailored to his personal responsibility and moral guilt." Enmund, 73 L.Ed2d at 1154. Helm's personal responsibility and moral guilt for his alcohol induced[22] compulsive - check writing offense, as well as for his previous non-violent offenses, certainly does not demand he be incarcerated for the rest of his life.

d. Life Imprisonment without Parole Will Not Rehabilitate.

No one can seriously dispute that a life sentence with no parole serves any

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[22] In Robinson v. California, 370 U.S. 660, 667 (1962) (cited in Enmunds, 73 L.Ed2d at 1153), a statute making narcotics addiction a crime was struck down under the Eighth Amendment even though such addiction "is apparently an illness which may be contracted innocently or involuntarily."

rehabilitative function. The State of South Dakota certainly has an interest in insuring that repeat offenders do not commit further crimes. This purpose could be as effectively handled by a death penalty. A punishment of imprisonment which sought some rehabilitation of Helm could also have as effectively satisfied the State's interest in preventing future violations of the law by Helm.

Justice Brennan observed in Furman v. Georgia, 408 U.S. 238, 279 (1972) (concurring opinion): "If there is a significantly less severe punishment to achieve the purposes for which the punishment is inflicted, the punishment inflicted is unnecessary and therefore excessive." The sentencing judge in this case was informed that all Helm's prior convictions, as well as the instant

one, were a product of Helm's alcoholism. State v. Helm, 287 N.W.2d at 498, 499 & 501. Despite this knowledge, the sentencing judge did nothing to consider a sentence which would aid Helm in overcoming his alcohol addiction except to summarily observe that Helm had not been motivated to stop drinking by his prior imprisonment. Helm v. Solem, App. to Pet., A-5 to A-6; State v. Helm, 287 N.W.2d at 500.

Consequently, the first prong of the Coker test cannot be said to have been met by the sentence in this case without a more extensive exploration of the possibilities of Helm's rehabilitation than was done by the sentencing judge in this case.

CONCLUSION

Upon the basis of the foregoing arguments and authorities, it is respectfully submitted this Court should affirm the

Judgment of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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